Daniel J. McDonald, Esq.
Smith Hartvigsen, PLLC
Outline of Presentation on Group Home Issues
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B. Disparate Treatment

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A. Group home ordinances vs. RTF ordinances

IX. ***Don't …***

A. Don't try to handle a request for accommodation without involvement of legal counsel experienced with the FHA, RA, ADA and UFHA

B. Don't draft or revise an ordinance without significant review and involvement of counsel experienced with the FHA, RA, ADA and UFHA

C. Don't count on a carefully-crafted ordinance solving all of your problems – the ordinance isn't usually the problem … it's *application* of the ordinance

D. Don't rely on "Step Mother" tactics – Boise County

E. Don't make pre-determined decisions without going through the processes

… "Let's give 'em a fair trial … then hang 'em"

F. Don't make discriminatory comments on the record

G. Don't have *ex parte* communications with the public clamor/opposition

H. Don't be afraid to ask for information about the students' disabilities

I. Don't make stereotypical assumptions – let the applicant make their own noose -- don't make your own noose

J. Don't be afraid to apply the normal land use criteria you would apply to any other applicant

K. Don't let claims get to trial if at all possible

X. ***Do's***

A. Involve counsel experienced with the FHA, RA, ADA and UFHA from the very beginning

B. Involve experienced counsel to help evaluate and redraft, if necessary, your ordinances

C. Create systems whereby you can easily identify comparable, non-disabled applicants and demonstrate that you have put them through equal land use rigors

D. Educate your planning and zoning staffs about the FHA, ADA and RA

E. Get your claim in federal court if at all possible

F. Make existing group homes your allies

G. Create and maintain easy access to a record of non-discrimination

H. Treat each new land use request/application as a risk management matter when it involves a group home or RTF

I. Rely upon objective criteria unrelated to the disabilities of the students
   1. Parking concerns
   2. Traffic concerns
   3. Safety issues
   4. Fire code

J. When you analyze claims, consider people with disabilities on equal footing with other suspect classifications such as …

   1. Race
   2. Religion
   3. Gender
   4. National Origin
   5. Ethnicity

K. Scour your publicly available information for discriminatory comments and fix them

L. Invest in a dispositive motion whenever you're involved in litigation

M. Realize the emerging distinctions between RTFs and group homes

N. Make FHA education and training a priority – but train to spot issues and not to solve FHA problems

XI. **What is on the horizon?**

A. More disabilities means more claims

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3. What constitutes a "dwelling'

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I.
FHA STATUTORY OVERVIEW

The FHA, RA and ADA are far-reaching federal civil rights statutes that make it unlawful for any person, including cities and counties, to discriminate against persons on account of their disabilities or handicaps. With regard to the FHA, courts have commented, "'[t]he scope of the statute is sweeping, not only in the broad protections it affords, but also in the limited exceptions it allows.'" *Hovsons, Inc. v. Township of Brick*, 89 F.3d 1096, 1106 (3d Cir. 1996) (quotation omitted). The United States Supreme Court has expressly acknowledged "the broad remedial intent of Congress embodied in the [Fair Housing] Act." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380 (1982).

Consistent with its broad remedial intent, Congress established multiple theories of liability under the FHA. For example, section 3604(f)(1) of the FHA prohibits forms of intentional discrimination and imposes liability for disparate treatment of the handicapped as well as liability for implementing generally applicable laws that have a disparate impact upon the handicapped. The FHA also makes it unlawful for any person, including a local government, to "coerce, intimidate, threaten, or interfere" with persons exercising their rights under the FHA. 42 U.S.C.A. § 3617. This includes an owner or developer who "aids" individuals in exercising their rights to housing by building housing for people with disabilities. Such interference encompasses both the obstruction of the developer's[1] right to build and the protected individual's right to housing.

[1] The Act specifically provides that an "aggrieved person" includes "any person who . . . claims to have been injured by a discriminatory housing practice," including "corporations, partnerships and associations." 42 U.S.C.A. §§ 3602(i)(1) and 3602 (d). The Act, therefore, not only protects the rights of the disabled, but also protects the rights of real estate owners, developers and managers to build and operate housing for persons with disabilities, even if the owners are motivated by profit.

Standing to bring a claim is easily established. As early as 1972, the United States Supreme Court held that the only requirement to assert a claim under the Act is that the aggrieved party suffered some type of distinct and palpable

In addition to disparate treatment, disparate impact and interference liability, section 3604(f)(3)(B) of the FHA establishes yet another form of liability under the FHA—liability for refusing and/or failing to make reasonable accommodations. It provides that "[f]or purposes of this subsection, discrimination includes ... a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling[.]" *Id.* § 3604(f)(3)(B).

A. Definition of "handicapped" or "disabled"

The FHA prohibits discrimination against individuals due to a "handicap," which is defined as including "physical or mental impairment which substantially limits one or more of [a] person's major life activities." 42 U.S.C.A. § 3602(h). Typically residents who have professionally recognized psychiatric or psychological diagnoses or learning disabilities constituting varying degrees of mental or emotional impairment or illness that interfere with, *inter alia,* the ability to work, enjoy normal social relationships, communicate, learn or study are considered handicapped or disabled and have qualifying disabilities under the FHA, ADA or RA. *See, e.g., United States v. Massachusetts Indus. Finance Agency*, 910 F. Supp. 21, 26 (D. Mass. 1996) (finding adolescents suffering from "professionally recognized psychiatric diagnoses" that substantially limit their ability to work and learn in a regular environment qualify as handicapped under the FHA).

However, a specific diagnosis is not required to meet the broad definition of a handicap or disability. Section 3602(h) of the FHA provides

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injury. *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972). Further, in 1979 the Supreme Court held that plaintiffs under the Act may assert the rights of others, who may be more direct victims, as long as the plaintiff suffers actual injury as a result of the defendant's conduct. *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91 (1979). For example, in the well-known decision of *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252 (1977), the Supreme Court upheld a developer's standing to challenge a municipality's adverse decision blocking the development of a subsidized housing project.

> "Handicap" means, with respect to a person—
> (1) a physical or mental impairment which substantially limits one or more of such person's major life activities,
> (2) a record of having such an impairment, or
> (3) being regarded as having such an impairment,
> but such term does not include current, illegal use of or addiction to a controlled substance (as defined in section 802 of Title 21).

42 U.S.C.A. § 3602(h).

The federal regulations promulgated under the FHA further define "handicap" as including "***any*** mental or psychological disorder, such as … emotional or mental illness, and specific learning disabilities." 24 C.F.R. § 100.201(a)(2) (emphasis added). Those regulations also list "emotional illness, "drug addiction (other than addiction caused by current, illegal use of a controlled substance) and alcoholism" as qualifying for a "handicap." *Id.* The definition of "major life activities" includes "caring for one's self" and "learning." *Id.* § 100.201(b). Definitions under the RA and ADA mirror these definitions.

B. Disparate Treatment

There are generally two types of disparate treatment claims—claims based upon direct evidence of disparate treatment and claims based upon indirect (or circumstantial) evidence of discrimination.

1. Direct Evidence Claims

A plaintiff can succeed on a direct evidence disparate treatment claim if a plaintiff with a handicap or disability has direct evidence that he or she was intentionally treated differently than similarly situated individuals because of that handicap or disability. While it is unusual for local government officials to openly and directly express their motive and intent to discriminate against persons with disabilities, such intent can be established by government actions and

exclusionary land practices. Of critical importance is the fact that "discrimination" against persons with disabilities need not be the exclusive or predominant reason for the locality's action. An FHA plaintiff need only establish that the discrimination was "a motivating factor" in the local government's decision. One of the ways that such discriminatory intent can be proved is by examining the events leading to a city or county's land use decision, thereby showing its departure from normal review and approval procedures for housing projects or proposals.

For example, in a group home case brought by the United States Department of Justice against the city of Chicago Heights, Illinois, the court held:

> [T]he Government has come forward with more than sufficient evidence to create a genuine dispute as to whether the City acted with discriminatory animus in voting to reject [the] special use permit. The City's failure to make any written factual findings or statement of reasons for denying the permit despite being required by its own law to do so, and the substantial community opposition voiced to the City *alone* are sufficient ….

United States v. City of Chicago Heights, 161 F. Supp. 2d 819, 846 (N.D. Ill. 2001) (emphasis added).

Decisions made in the face of community opposition and public clamor are also often inherently discriminatory because such opposition is usually motivated by ill-conceived stereotypes of the disabled, ignorance and prejudice, which are inappropriate bases for decision making. *Assoc. of Relatives and Friends of AIDS Patients v. Regulations & Permits Administration*, 740 F. Supp. 95, 104 (D. Puerto Rico 1990). A "decisionmaker has a duty not to allow illegal prejudices of the majority to influence the decisionmaking process." *Id.* "[I]f an official act is performed simply in order to appease the discriminatory viewpoints of private parties, that act itself becomes tainted with discriminatory intent even if the decisionmaker personally has no strong views on the matter." *Id.* In short, it is sufficient simply to show that

"local officials are effectuating the discriminatory designs of private individuals." *Dailey v. City of Lawton*, 425 F.2d 1037, 1039 (10th Cir. 1970).

2. Indirect Evidence

Where the plaintiff does not have direct evidence of discrimination—which is more frequently the case—the analysis proceeds under the *McDonnell Douglas* burden-shifting[2] analysis. *See Bangerter*, 46 F.3d at 1501at n.16 (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973)). Under the *McDonnell Douglas* framework, the plaintiff has the burden of establishing a prima facie case[3] of discrimination. *Sanchez v. Denver Pub. Sch.*, 164 F.3d 527, 531 (10th Cir. 1998). Once a plaintiff establishes a prima facie case of discrimination, the burden of production shifts to the defendant to articulate some legitimate nondiscriminatory reason for its decision. *Kendrick v. Penske Transp. Servs., Inc.*, 220 F.3d 1220, 1226 (10th Cir. 2000). If the defendant is able to articulate a legitimate nondiscriminatory reason for its decision, the burden then shifts back to the plaintiff to demonstrate the defendant's proffered justification is pretextual. *Id.*

"When assessing whether [a] plaintiff has made an appropriate showing of pretext, [the court] must consider the evidence as a whole." *Danville v. Reg'l Lab Corp.*, 292 F.3d 1246, 1250 (10th Cir.2002). Pretext may be shown "by such weaknesses, implausibilities, inconsistencies,

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[2] "'Where direct evidence is used to show that a housing decision was made in violation of the statute, the burden shifting analysis is inapposite.'" Gilligan v. Jamco Dev. Corp., 108 F.3d 246, 250 (9th Cir. 1997) (quoting *Kormoczy v. United States Dep't of Hous. & Urban Dev.*, 53 F.3d 821, 824 (7th Cir. 1995)). "The McDonnell Douglas/Burdine elements will be irrelevant if the [plaintiffs] are able to advance direct evidence of discrimination." *Id.*

[3] The elements of a prima facie case are adaptable to different procedural contexts. For example, the following elements must be met to establish a prima facie case in the context of denial of a conditional use permit:

> (1) plaintiff is a member of a protected class; (2) plaintiff applied for a conditional use permit and was qualified to receive it; (3) the conditional use permit was denied despite plaintiff being qualified; and (4) defendant approved a conditional use permit for a similarly situated party during a period relatively near the time plaintiff was denied its conditional use permit.

Gamble v. City of Escondido, 104 F.3d 300, 305 (9th Cir. 1997).

incoherencies, or contradictions in the … proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence and hence infer that the [defendant] did not act for the asserted non-discriminatory reasons." *Id.* (quotation omitted). The courts consider the facts as they appeared to the person making the decision, and do not second-guess the decision with 20/20 hindsight even if it seems in hindsight that the action taken constituted poor judgment. *See Young v. Dillon Cos.,* 468 F.3d 1243, 1250 (10th Cir. 2006).

C. Disparate Impact

A plaintiff also can prove discrimination in violation of the FHA by establishing that a local government's actions disparately impacted the protected class of persons with disabilities. Accordingly, if a city or county has rejected a housing community or project through a supposedly neutral application of the law that disparately impacts the disabled's ability to obtain housing, regardless of the motive of the government, then the plaintiff may be awarded damages to reimburse it for the monetary injury it has suffered because of the disparate impact the law has on the disabled or obtain injunctive relief as provided by the act. *Cf. Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 935(2d Cir. 1988); *see also Gamble v. City of Escondido*, 104 F.3d 300, 306 (9th Cir. 1997).

Disparate impact claims are extremely difficult to prove in the group living context because the law requires that the disparateness be between group living arrangements for handicapped persons versus similar group living arrangements for non-handicapped persons. This group-home-to-group-home comparison rule applies unless there is statistical evidence presented showing a causal linkage between being handicapped and living in a group home. *See Gamble*, 104 F.3d at 307. "If a significant correlation exists between being disabled and living

in group houses, a disparate impact on group housing could conceivably establish a prima facie disparate impact claim." *Id.* at n.2.

D. Reasonable Accommodation

The FHA's "'reasonable accommodations' provision prohibits the enforcement of 'zoning ordinances and local housing policies in a manner that denies people with disabilities access to housing on par with that of those who are not disabled.'" *Hovsons,* 89 F.3d at 1104 (quoting Laurie C. Malkin, *Troubles at the Doorstep: The Fair Housing Amendments Act of 1988 and Group Homes for Recovering Substance Abusers,* 144 U. Pa. L.Rev. 757, 804 (1995)).

If a local government's laws, ordinances or practices would otherwise prohibit the type of housing proposed, then the FHA imposes "'an affirmative duty' to make reasonable accommodations on behalf of handicapped persons." *Id.* Hence, courts interpreting the reasonable accommodation provision of the FHA have ruled that municipalities "must change, waive, or make exceptions in their zoning rules to afford people with disabilities the same opportunity to housing as those who are without disabilities." *Horizon House Developmental Servs., Inc. v. Township of Upper Southampton*, 804 F. Supp. 683, 699-700 (E.D. Pa. 1992). As the Tenth Circuit has identified, "the thrust of a reasonable accommodation claim is that a defendant must make an affirmative change in an otherwise valid law or policy." *Bangerter,* 46 F.3d 1491, 1501-02 (10th Cir. 1995). By definition, "a 'reasonable accommodation' involves 'changing some rule that is generally applicable so as to make its burden less onerous on the handicapped individual.'" *Id.* at 1502.

Enactment of the FHA was "a clear pronouncement of a national commitment to end the unnecessary exclusion of persons with handicaps from the American mainstream." H.R. Rep. No. 711, 100th Cong., 2d Sess. 18, *reprinted in* 1988 U.S.C.C.A.N. 2173, 2179. It was

"intended to prohibit the application of special requirements through land-use regulations ... that have the effect of limiting the ability of such individuals to live in the residence of their choice in the community." *Id.* at 2185. Congress expressly recognized

> While state and local governments have authority to protect safety and health, and to regulate use of land, that authority has sometimes been used to restrict the ability of individuals with handicaps to live in communities. This has been accomplished by such means as the enactment or imposition of health, safety or land-use requirements on congregate living arrangements among non-related persons with disabilities. Since these requirements are not imposed on families and groups of similar size of other unrelated people, these requirements have the effect of discriminating against persons with disabilities.

Id.

Congress also intended to "require that changes be made to ... traditional rules or practices if necessary to permit a person with handicaps an equal opportunity to use and enjoy a dwelling." *Id.* at 2186. The House Report to the FHA expressly states that the act "is intended to prohibit ... [the imposition of] terms or conditions ... which have the effect of excluding ... congregate living arrangements for persons with handicaps." *Id.* at 2184.

Federal courts routinely acknowledge the necessity of congregate living arrangements for persons with handicaps. The commercial or for-profit nature of such facilities is generally irrelevant to zoning decisions because "'the handicapped may have little choice but to live in a commercial home if they desire to live in a residential neighborhood.'" *Hovsons, Inc.*, 89 F.3d at 1105 (quoting *Smith & Lee Assocs., Inc. v. City of Taylor*, 13 F.3d 920, 930 (6th Cir. 1993)). Indeed, sometimes the *only* way people with handicaps can enjoy residential housing is through the on-site availability of "commercial" support services provided by teachers, counselors, therapists and other experts. *See, e.g., Behavioral Health Services, Inc. v. City of Gardena*, 2003 WL 21750852 (C.D. Cal. 2003). "The FHAA does not require group home providers to give away their services, to operate at a loss, nor to declare a particular tax status. If it did, there

would be far fewer residences for disabled persons than there presently are." *City of Chicago Heights*, 161 F. Supp. 2d at 844.

Also, "Congress intended the FHA[] to protect the right of handicapped persons to live in the residence *of their choice* in the community." *City of Edmonds v. Washington State Building Code Council*, 18 F.3d 802, 806 (9th Cir. 1994) (emphasis added). Thus, the "question [is] not whether *any* housing [is] made available, but whether housing [the] individual *desired* was denied on impermissible grounds." *Id.* (citing *United States v. Badgett*, 976 F.2d 1176, 1179 (8th Cir. 1992) (emphasis added)).

If a local government determines that one of its ordinances or policies prohibits the desired type of housing or an accommodation is not possible then some circuits have held that both sides must participate in a "good-faith exploration of possible accommodations." *Humphrey v. Mem'l Hosps. Ass'n*, 239 F.3d 1128, 1137 (9th Cir. 2001). *But see Lapid-Laurel*, 284 F.3d at 455-56 (holding that there is no interaction requirement under the FHA). This requirement is not explicit in the FHA, itself, but is an emerging requirement based upon the interrelationship between the FHA and the ADA and RA, where such an interactive process is required.[4]

[4] The case of *Giebeler v. M&B Associates*, 343 F.3d 1143 (9th Cir. 2003) acknowledges, "we have applied [Rehabilitation Act] regulations and case law when interpreting the FHAA's reasonable accommodation provisions." *Id.* at 1149. The Ninth Circuit has said that "since the enactment of the Americans with Disabilities Act (ADA) … we have relied on ADA cases in applying the RA, because, as a general matter, 'there is no significant difference in the analysis or rights and obligations created by the two Acts.'" *Id.* (quoting *Vinson v. Thomas*, 288 F.3d 1145, 1152 n. 7 (9th Cir. 1999)). Consequently, the Ninth Circuit has concluded, "We … look to both RA and ADA interpretations of 'accommodation' of disabled individuals as indicative of the scope of 'accommodation' under the FHAA." *Id.*

In *Dark v. Curry County*, 451 F.3d 1078, 1088 (9th Cir. 2006), the Ninth Circuit stated, "our cases make clear that the County bore an affirmative obligation to engage in an interactive process in order to identify, if possible, a reasonable accommodation . . . ." *Id. See also, e.g., Barnett v. U.S. Air, Inc.*, 228 F.3d 1105, 1111-12 (9th Cir.2000) (en banc) (applying the interactive process requirement in a Title III case under the ADA), *rev'd on other grounds*,535 U.S. 391, 122 S.Ct. 1516, 152 L.Ed.2d 589 (2002); *see also Vinson v. Thomas*, 288 F.3d 1145, 1154 (9th Cir.2002) (applying the interactive process requirement in a Rehabilitation Act case).

In "granting" accommodations, local governments must be cautious not to impose discriminatory conditions or offer an "accommodation" that is only nominally so but, in actuality, "refuse[s] to accommodate by imposing unreasonable conditions on the grant of a use permit." *City of Gardena*, 2003 WL 21750852 at *10. What is "reasonable" or "unreasonable" is often in the eye of the beholder and can catch cities or towns off guard. For example, in *Turning Point, Inc. v. City of Caldwell,* 74 F.3d 941 (9th Cir. 1996), the Ninth Circuit Court of Appeals held that the City of Caldwell, Idaho, violated the FHA by requiring that a special use permit be subject to annual review. *Id.* at 945.

Even public safety concerns can and will be scrutinized by the courts. To be sure, cities and counties can impose reasonable restrictions and conditions in the interest of public safety. However, "[r]estrictions predicated on public safety cannot be based on blanket stereotypes about the handicapped, but must be tailored to *particularized* concerns about *individual* residents … 'Generalized perceptions about disabilities and unfounded speculations about threats to safety are specifically rejected as grounds to justify exclusion.'" *Bangerter*, 46 F.3d at 1503 (emphasis added) (quoting H.R. Rep. No. 100-711 at 18, 1988 U.S.C.C.A.N. at 2179).

E. FHA Remedies and Relief

A local government can be sued like any other defendant and is liable for monetary damages suffered by the developer. *See, e.g., San Pedro Hotel Co. v. City of Los Angeles*, 159 F.3d 470, 475 (9th Cir. 1998); *Keith v. Volpe*, 858 F.2d 467 (9th Cir. 1988). Such damages include the developer's lost profits. For example, in *Silver Sage Partners, Ltd. v. City of Desert Hot Springs*, 251 F.3d 814, 825 (9th Cir. 2001), the court held that developers, syndicators and brokers were entitled to damages in the amount of $3.04 million for a municipality's violation of the Act—even if the amount of the developer's damages included lost profits that were incapable

of exact measurement. The Court specifically held that lost profits could be recovered and that damages could be proved by the testimony of an expert witness. Further, the court suggested that, unlike the requirements of other civil rights statutes, under the FHA, the plaintiffs had no duty to mitigate the damages caused by the city by undertaking some other real estate opportunity. *Id.* at 824-25.

Additionally, "if the court finds that a discriminatory housing practice has occurred or is about to occur, the court may award to the plaintiff … punitive damages." 42 U.S.C.A. § 3613(c)(1). In addition to actual and punitive damages, the court may issue "any permanent or temporary injunction, temporary restraining order, or other order (including an order enjoining the defendant from engaging in such practice or ordering such affirmative action as may be appropriate)[,]" *id.*, which can include consent decrees and court-ordered supervision.

In addition to issuing an award of the developer's actual damages (including lost profits) and punitive damages federal courts will, as a matter of course, award the developer its attorney's fees and costs pursuant to 42 U.S.C.A. § 3613(c)(2).